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Supreme Court, U.S.
FILED

90-1097

DEC 26 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

In re: BERNARD J. DOLENZ, Petitioner

APPENDIX FOR PETITION FOR CERTIORARI

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, TX 75214
(214) 821-0220
TX Bar No. 05957750
Petitioner, Pro Se

Thomas D. Lardin
1901 W. Cypress Creek Rd.
#100
Fort Lauderdale, FL 33309
(305) 938-4406
Counsel for Stuart Yacht
Builders, Inc.

November 29, 1990

550P



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY
DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS. NO.
8668384-CIV-Zloch

ARIES STAR TREK, enrollment
#55798, together with all
tackle and apparel

BRIEF IN SUPPORT OF
MOTION TO DISMISS; MOTION TO RECONSIDER
TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT HAD NO JURISDICTION AS THE
MERITIME LIEN WAS DEFECTIVE AS THERE WAS
NO UNDERLYING MARITIME CONTRACT.

The underlying action against the
Defendant vessel is defective as it is
basically a dispute over charges, and is
not grounded in a maritime contract.

GENERAL ENGINE & MACH. WORKS, INC. V.
SLAY, D.C. Ala. 1963, 222 F. Supp. 745
holds: "If contract is not directly or
substantially related to navigation,
even though it is to be performed on

water, or on board, or for benefit of vessel, it cannot be enforced in admiralty court."

THE VESSEL IS IN THE PROCESS OF BEING BUILT AND HAS NEVER BEEN FINISHED, AND THEREFORE CANNOT BE GROUNDED IN A MARITIME CONTRACT

NILO BARGE LINE, INC. v. M/V BAYOU DULARGE, CA NO. 1978, 584 F 2D 84 holds: "Contract for building or supplying materials for original construction and outfitting of ship is not maritime contract."

TROPWOOD, A.G. v. TAE CHANG WOOD INDUSTRY CO., LTD. D.C. ILL. 1978, 454 F. Supp. 964 holds: "In general, to invoke admiralty jurisdiction over a contract, subject matter must be wholly maritime in nature; contract must directly concern navigation or commerce on navigable waters."

MELISSA KEYES HAD EQUITABLE TITLE TO THE DEFENDANT VESSEL MARCH 16 AS THE

ASSIGNMENT TO BERNARD DOLENZ HAD NOT BEEN DELIVERED TO HIM OR HIS ATTORNEY, AND HER ATTORNEY SHOULD NOT HAVE BEEN PERMITTED TO WITHDRAW UNDER THE CIRCUMSTANCES; OR IF PERMITTED, THE TRIAL SHOULD HAVE BEEN CONTINUED.

"Where the assignment is by a written instrument, simply signing or acknowledging the instrument is not sufficient to transfer the property, and delivery of the instrument is necessary to complete the assignment. "HEYMAN V. KLINE, D.C. Conn., 344 F. Supp. 1088, affm in part and reversed in part on other grounds, D.A., 456 F2d 123, cert. den. 93 S. Ct. 53, 409 U.S. 847, 34 L. Ed. 2d 88.

So, the mere endorsement of a transfer on an instrument without proof of delivery, will not be sufficient to establish the assignment thereof.

ILLINOIS POWDER MFG. CO. V. SECURITY

RECORDED AND INDEXED IN PC 100, AND
FILED 2/21/1941. RABILY vs. CHERON, et al.,
1938-OK-1465. Plaintiff - Mo. and
Kyles had standing to defend the action
as they had information in the
matter and those may be given up to
the attorney for the causeless represent
ation. It is held that Kyles had been
represented and withdrawn from the
action which under the circumstances had
no attorney, no defendant.

(CAPTION)-U.S. DISTRICT COURT

CLAIM OF BERNARD J. DOLENZ

COMES NOW, BERNARD J. DOLENZ, and presents his claim as follows:

1. BERNARD J. DOLENZ is the owner of the seized property identified as the "ARIES STARTREK, ENROLLMENT NO. 555798, TOGETHER WITH ALL TACKLE AND APPAREL", of said vessel. On March 14, 1987, an agent of Melissa Keyes gave an oral assignment of the above seized property to Bernard J. Dolenz in Dallas, TX which was ratified subsequently by Melissa Keyes, said assignment being notarized March 23, 1987, and being delivered in Dallas, TX on March 26, 1987 to Bernard J. Dolenz.

2. BERNARD J. DOLENZ is the owner of the aformentioned vessel and any of its

tackle, apparel, appurtenances and other equipment in the possession of the Plaintiff, both at the shipyard at 450 Southwest Salerno Road, Stuart, Florida, 33494, the Mini Bay Use Storage, at 1105 N.E. Industrial Boulevard, Jensen Beach, Florida, storage bin no. 199 and any other location to which any of the appurtenances, tackle and other equipment at whatever location said equipment has been removed and placed.

3. BERNARD J. DOLENZ, as the owner of the "ARIES STARTREK" and its tackle, appurtenances, apparel and equipment demands its restitution and the right to defend this action.

Bernard J. Dolenz

(Notarized April 3, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ADMIRALTY DIVISION
CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment
#55798, together with all
tackle and apparel

Defendant.

BRIEF TO SUPPORT THE MOTION TO DISMISS
TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT LACKS JURISDICTION

The Plaintiff assumes that jurisdiction exists choosing for his own reason to have this case decided by an admiralty court hoping that the jurisdictional point may be easily over-looked by the Court when it is dealing with the contract having a nautical favor.

An inspection of the Plaintiff's documents confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a steaming system, and alterations to the vessel all relate to the original construction of the vessel. EXHIBIT "A"

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1). In Bond v. F/V Mermaid (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that

services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction. This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1), the Court concluded.

The Plaintiff's own invoices and statements indicate that Mr. Burdick knew that the boat was "only about 70% completed". EXHIBIT "B". In EXHIBIT "B", Burdick indicates that he is in the process of re-designing the unfinished boat. the bottom-side still required interior finishing, installation of wiring, plumbing, steering mechanisms, engine fittings, desk fittings, masts and riggings. The boat was never

completed because of lack of funds to complete her by the previous owners.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal- (Flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl (1966, CA4 Md) 363 F2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct 82), and when raised must be examined and decided (Armstrong Cork Co. v. Farrell Line, Inc. (1948, DC Pa) 81 F Supp 848). Or the court itself may raise the issue, and, consequently, Plaintiff's counsel must be prepared to demonstrate admiralty jurisdiction to a court's satisfaction, and his failure to carry this burden when called upon by the Court, even though Defendants counsel also argues to the Court that there is no problem as to jurisdiction, will result in dismissal (Rhederei Actien

Gesellschaft Oceana v. Clutha Shipping
Co. (1915, DC Md 226 F 339).

Agreements for alterations and additions to plans ordered by the owners are not maritime contracts and, hence, not within the purview of admiralty jurisdiction. This holding has been repeated many times by decisions of the United States Supreme Court beginning in 1857 with People's Ferry Co. v. Beers (1857) 61 US 393, 15 L Ed 961. People's Ferry held that District Courts of the United States had no jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends, pointing out that liens on vessels encumber commerce.

The Court said that it would be a strange doctrine to hold the ship bound in a case where the owner made the

contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a seagoing ship, and that as to the contract being purely maritime and touching rights and duties appertaining to navigation, it was a contract made on land, to be performed on land, the wages of the shipwrights having no reference to a voyage to be performed, so that they were bound to rely on their contract.

In *Thames Towboat C. v. The Schooner "Francis McDonald"* (1920) 254 US 242, 65 L Ed 245, 41 S Ct 65, the United States Supreme Court held that the Plaintiff's contract to furnish materials, work, and labor for her completion made after the schooner was launched BUT WHILE NOT SUFFICIENTLY ADVANCED TO DISCHARGE THE FUNCTIONS FOR WHICH SHE WAS INTENDED, was not within the admiralty and maritime jurisdiction. (Emp. added).

THE DEFENDANT "ARIES STAR TREK" IS NOT A
VESSEL

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Act of July 18, 1896 Ch 201 Section 1, 14 Stat 178, incorporated into the Revised Statutes as Section 3.

The "Aries Star Trek" has never been seaworthy, and has never been capable of being used as a means of transportation on water. Basically, this is why the "Aries Star Trek" was placed in the Plaintiff's hands so that she could become seaworthy. The Defendant never had a crew or machinery in operation that would make it navigable.

ALTERNATIVELY, DEFENDANT "ARIES STAR TREK" WAS A "DEAD SHIP".

Assuming that the Plaintiff contends that the Defendant "Aries Star Trek" was launched, which is denied by the Defendant, it should be clear that the "dead ship" doctrine would apply as the Defendant was withdrawn from any maritime activity or navigation and therefore would not fall within the admiralty jurisdiction. "A ship is made to plough the seas, and not to lie at the walls." The Poznan (1925, CA2 NY) 9 F 2d 838, revd on other grounds New York Dock Co. v. The Poznan, 274, US 117, 71 L Ed 955, 47 S Ct. 482.

In Nanna v. The Meteor (1950, DC NY) 92 F. Supp 530, affd (CA2) 184 F2d 439, cert den 349 US 933, 95 L Ed 673, 71 S Ct 497, the Meteor had been part of a reserve fleet which was purchased by the Plaintiff from the US Maritime

Commission. The boat's Coast Guard Certificate of Inspection had expired, as had her Certificate of Enrollment and license with the Bureau of Customs. The vessel was towed to New York where painting services were performed, and during that period it had no crew, light, heat, or power, and no machinery in operation. The Court found that in order for the Meteor to have been returned in navigation and commerce, there would have been required very extensive repairs AND PROPER DOCUMENTATION, and concluded that the Meteor was a "dead" ship.

This is analagous to the Defendant "Aries Star Trek" as it needs extensive work before it can even be seaworthy, and will require proper documentation before it can be returned for navigation and commerce.

The "dead ship" doctrine was considered in Hercules Co. v. The Brigadier General

Absolom Baird (1954, CA3 NJ) 214 F2d 66, where the District Court found as fact that at the time of labor and services for which a maritime lien was sought, the vessel "was not in commission and she was unable to sail, " and concluded that no maritime lien arose under 46 USC Section 971.

The Defendant is not in commission and is not able to sail as the top-side has never been out-fitted with masts and rigging.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant prays of the Court to dismiss this action as it lacks jurisdiction, there was no maritime contract the Defendant "Aries Star Trek" is not a vessel as defined in Admiralty Law; and alternatively, that the Defendant is a "dead ship", and for Rule 11 Sanctions

against the Plaintiff as the Court may deem proper for the vexatious and frivolous lawsuit brought into this Court without jurisdiction; and for costs of Court and attorney fees expended in defending this case; and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

On the 4th day of April, a copy of the foregoing instrument and Claim of Bernard J. Dolenz was sent by regular mail to Steven Perry, P.O. Drawer 24, Stuart, FL 33495-0024.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida corporation,

Plaintiff,

vs.

ORDER

ARIES STARTREK, Enrollment
No. 555798, together with
all tackle and apparel,

Defendant.

THIS MATTER is before the Court upon the Motion for Intervention (DE 25), the Motion To Dismiss and Motion To Reconsider (DE 27) and the Motion for Sanctions (DE 35) filed herein by Bernard Dolenz and the Court having reviewed the merits of said Motions, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The Motion For Intervention (DE 25) filed herein by Bernard Dolenz be and the same is hereby DENIED;

2. The Motion to Dismiss And Motion to Reconsider (DE 27) filed herein by Bernard Dolenz be and the same is hereby DENIED; and

3. The Motion for Sanctions (DE 35) be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of September, 1987.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
Bernard Dolenz,
Stephen Perry, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA -
ADMIRALTY DIVISION

STUART YACHT BUILDERS, INC.
Plaintiff,
v.
ARIES STARTREK,
Defendant.

No. 86-8384-CIV-ZLOCH

(Filed January 4, 1988)

MOTION FOR HEARING

COMES NOW, Bernard J. Dolenz, owner of the Defendant, Aries Startrek, and respectfully moves this Court for an Order for a Hearing, and for grounds would show as follows:

1. There is pending before this Court the Defendant's Second Motion to Dismiss, and Alternatively, to Increase Insurance and to Impose Sanctions for Failure to Maintain the Vessel. This Motion was sent October 12, 1987.

2. The unfinished craft is still dete-

riorating under the care of the Plaintiff, even though the Plaintiff had assured the Court that it would take care of the craft properly.

3. These delays have caused the Defendant craft serious harm and deterioration, and therefore there is urgency to have this Honorable Court make a disposition. The Defendant urges that this case is inappropriately before this Court for the reasons previously given, and this Defendant urges that this case be dismissed with appropriate relief for the harm done to the craft while under the stewardship of the Plaintiff.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

NOTICE OF MOTION

TO: Steve Perry, P. O. Drawer 24, Stuart,
FL 33495-0024.

Please take notice that on ___, 1988, at

____ o'clock ____ .m. or as soon thereafter as counsel can be heard, in Room ___, United States Courthouse, the undersigned will bring the Second Motion to Dismiss, and Alternatively, to Increase Insurance and to Impose Sanctions for Failure to Maintain the Vessel on for hearing.

DATED: December 31, 1987.

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument was sent by regular mail to Steven Perry, P. O. Drawer 24, Stuart, FL 33495-0024 on this the 31st day of December, 1987.

Bernard J. Dolenz, J.D., M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.

a Florida Corporation,

Plaintiff,

v.

ORDER

ARIES STARTREK, ENROLLMENT

NO. 555798, TOGETHER WITH

ALL TACKLE AND APPAREL,

Defendant.

THIS MATTER is before the Court upon the Motion For Hearing (DE 44) filed herein by Bernard J. Dolenz, and the Court having carefully considered the merits of said Motion, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motion For

Hearing (DE 44) filed by Bernard J. Dolenz
be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort
Lauderdale, Broward County, Florida, this
15th day of January, 1988.

William J. Zloch
U.S. Dist. Judge

Copies furnished:

Steven L. Perry, Esq.

Bernard J. Dolenz, J.D., M.D.

6102 Swiss Avenue

Dallas, TX 75214

(Filed January 15, 1988 with Robert M.
March - Clerk U.S. District Court).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Cause No. 86-8384-CIV-ZLOCH
STUART YACHT BUILDERS, INC.,
a Florida Corporation,

Plaintiff,

v.

ARIES STARTREK, ENROLLMENT NO. 555798,
TOGETHER WITH ALL TACKLE AND APPAREL,
Defendant.

MOTION FOR HEARING REGARDING JURISDICTION
AND SUPPORTING BRIEF

NOW COMES, Bernard J. Dolenz, and moves
for a Hearing regarding Jurisdiction in
the case.

1. Bernard J. Dolenz is the owner of the Aries Startrek, the seized property, and his claim of ownership was sent on April 3, 1987 with supporting documents.
2. The "boat" has never been complete,









United States District Court
Southern District of Florida
Case No. 86-8384-CIV-ZLOCH

FILED JULY 5, 1989

Stuart Yacht Builders, Inc.,
a Florida Corporation,
Plaintiff,
V.

Aries Startrek, Enrollment No. 555798,
together with all tackle and apparel, etc.
in rem,
Defendant.

JUDGMENT FOR COSTS AND ORDER
OF RELEASE AND/OR SALE

THIS MATTER is before the Court, sua
sponte, upon the Final Judgment (DE 51)
entered in this cause on February 16,
1988, upon Plaintiff, Stuart Yacht Build-
ers, Inc.'s, Motion for an Award of Costs
(DE 52), upon the Affidavit (DE 65) of
Gregory Noyes Burdick, Substitute
Custodian, filed in support of costs and
expenses incurred subsequent to the Final
Judgment (DE 51), and the Affidavit of

Davie Lowe, IV, Edward Clifton, and Gregory Noyes Burdick, all bearing Clerk's Stamp dated June 19, 1989, and the Court has carefully reviewed said Final Judgment, Motion and Affidavits, has reviewed the court file and is otherwise fully advised in the premises. Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff, Stuart Yacht Builders, Inc.'s Motion for an Award of Costs (DE 52) be and the same is hereby GRANTED and the Court hereby awards costs to Plaintiff incurred as Substitute Custodian from the February 16, 1988, judgment date through July 5, 1989, in the amount of \$20,433.93, for which let execution issue in accordance with the Final Judgment (DE 51) entered in this cause of February 16, 1988. This amount is calculated as follows:

a. Routine Maintenance (499 days x	
\$3.517/day [\$25.00/week])	\$1,754.98
b. Hull Insurance (16 17/31 months @	
\$219.00/mo.)	3, 624.10
c. Mini Bay Storage (16 17/31 months @	
\$121.90/mo.)	2,017.25
d. Storage Charges (\$.20/day/foot x	
72/foot = \$14.40 x 499 days)	7,185.60
e. U.S. Marshall Insurance Premium	
(\$1,000.00 [3/88] + \$500.00 [10/88] +	
\$200.00 [12/88] + \$200.00 [2/89] +	
\$285.00 [4/89] + \$155.00 [5/89])	2,340.00
f. February 16, 1988 judgment amount of	
\$38,899.88 at the then effective legal	
Federal interest rate of 6.59% per annum,	
for 499 days	3,512.00
TOTAL	\$20,433.93

2. The Court, having given the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, a right of first purchase, prior to sale by the U.S.

Mars al, of Defendant vessel, for an amount equal to the amount of Final Judgment (DE 51) (\$38,899.88) plus the subsequent costs and expenses awarded to the Substitute Custodian (\$20,433.93), hereby gives the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, notice that it has thirty (30) days from the date of this Order in which to tender a cashier's check in the amount of \$59,333.81, to Steven L. Perry, Esq., counsel of record for Plaintiff, in full satisfaction of Plaintiff's claims to the Defendant vessel;

3. Upon the tender of said payment, Plaintiff shall immediately surrender the Defendant vessel to the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, at which time Plaintiff shall be relieved of all further duties and responsibilities as Substitute Custodian in

the above-styled cause; and

4. At the expiration of this thirty day period, if the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, have not tendered said payment, Plaintiff shall immediately undertake the necessary steps to accomplish the following:

a. The ARIES STARTREK, Enrollment No. 555798, together with all tackle and apparel, etc, in rem, shall be sold by the United States Marshal, Southern District of Florida, free and clear of all liens from preexisting claims on the vessel, whether recorded or otherwise, in accord with appropriate U.S. statutes and Supplemental Rules, Fed. R.Civ. P.;

b. Plaintiff shall be entitled to bid \$59,333.81;

c. Notice of such sale shall be made by advertisement pursuant to the Rules of the Court, and the reasonable cost of

such advertisement shall be advanced by Plaintiff and constitutes a taxable cost of this action. If the Plaintiff is the purchaser of the vessel, the clerk shall credit the Plaintiff's bid with the total sums due pursuant to the Judgment together with interest and any costs incurred subsequent to the Judgment;

d. The proceeds of such sale, upon confirmation by the Court, shall be paid by the United States Marshal into the Registry of the Court to await and abide further order of this Court; and

e. Upon holding the sale, a single Certificate of Sale, Certificate of Title and Certificate of Disbursement shall be filed as to the vessel sold and the proceeds of the sale shall be applied to the Judgment of Record and to satisfy any costs incurred by Plaintiff subsequent to the Judgment. In the event that there is an excess above and beyond the Judgment

and costs, this amount shall be placed in the registry of the Court to be disbursed upon the application of the individuals claiming to be the owners of the vessel at the time this Judgment was entered.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of July, 1989.,

S/S
William J. Zloch
United States District Judge

Copies Furnished to:
Steven L. Perry, Esq.,
for Plaintiff

Melissa Keyes, Pro Se, Claimant
c/o Turks Island Divers
Hotel Kittina
P. O. Box 281
Grand Turk
Turks and Caicos, British West Indies

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 89-5720 and 89-5852
Non-Argument Calendar

D. C. Docket Nos. 86-08384-CIV-WJZ,
No. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida Corporation,

Plaintiff-Appellee,

versus

**ARIES STARTREK, ENROLLMENT NO.
555798, together w/all tackle
and apparel,**

Defendant,

BERNARD DOLENZ,

Claimant-Owner-Appellant.

**Appeals from the United States District Cou
for the Southern District of Florida.**

(August 20, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 89-5720 and 89-5852
Non-argument Calendar

D.C. Docket Nos. 86-08384-CIV-WJZ,
86-8384-CIV-WJZ

STUART YACHT BUILDERS, INC.,

a Florida Corporation,

Plaintiff/Appellee,

v.

CHARLES STARKEY, alias CHARLES

ARIES STARTREK, ENROLLMENT NO.

555798, together w/all tackle

and apparel,

Defendant,

BERNARD DOLENZ,

Claimant/Owner/Appellant.

Appealed from the U.S. District Court
for the Southern District of Florida.

MOTION FOR RE-HEARING IN BANC

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, TX 75214
214-821-0220
TX Bar Card No: 05957750

TO THE HONORABLE JUSTICES OF THE ELEVENTH
CIRCUIT:

1. While the Court affirmed the Trial Court's judgment on August 20, 1990 pursuant to 11th Cir. R. 36-1, the Appellant is requesting a Re-hearing as the opinion rendered seems to be in such conflict with precedents of the Supreme Court and case law as to cause this to be brought to the attention of the entire Court.

2. In this regard, Federal Courts are of limited jurisdiction, and are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution and have been entrusted to them by a jurisdictional grant by Congress. Wright, LAW OF FEDERAL COURTS, p. 17. Whether a Federal Court has jurisdiction or not is such a fundamental issue that it can be raised

for the first time on appeal. 2 Am Jur 2d, 842, Section 202.

3. The Appellant contends that the Trial Court lacks jurisdiction, and the case should be dismissed as no admiralty law can attach to a vessel that has never been finished, commissioned, and is still under construction. As evidence are three documents that have been before the Court that reflect that this vessel was not complete. These documents are annexed, and are:

a. The U.S. Marshall's statement in the record showing that the "... vessel is incomplete, under construction, and empty of equipment..."

b. The Appellee's marine surveyor statement that the vessel was never completely finished or commissioned.

c. The Appellee's statement quoted in newspaper articles that the boat was

about 70% completed.

I.

THE APPEALS COURT ERRED IN GIVING AFFIRMANCE WITHOUT OPINION AS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ERRONEOUS.

In this regard, Findings of Fact 1, 5, 14, and Conclusions of Law 1, 4, 5, 6, 7, 9, and 10 were all controverted and arguments were given in the Appellant's Brief.

II.

THE APPEALS COURT ERRED AS THE JUDGMENT HAD SEVERAL ERRORS OF LAW; THE MOST GLARING BEING THAT THE TRIAL COURT HELD THAT IT HAD JURISDICTION, WHEN IN FACT IT COULD NOT HAVE JURISDICTION IN ADMIRALTY OVER AN UNFINISHED OR UNCOMMISSIONED BOAT.

If there is no basis under 28 USC, Section 133 or 46 USC, Section 971, then

jurisdiction fails as a maritime contract is necessary to invoke jurisdiction under those statutes. If there is an exception where an unfinished or uncommissioned vessel can come under the purview of those statutes, this Appeals Court should address it as for over a century, supplying materials for construction of a vessel is not a maritime contract.
PEOPLE'S FERRY CO. V. BEERS, (1857) 61 US (20 How.) 393, 15 L Ed, 961.

"Even after the vessel was launched, while she is not yet sufficiently advanced to discharge the functions for which she is designed, the materials, work, and labor for her completion are not the subject-matter of admiralty jurisdiction". THAMES TOWBOAT CO. V. THE FRANCIS McDONALD, (1920) 254 US 242, 65 L Ed 245 41 Sup Ct. Rep. 65.

Here, the Appellee admits in the news-

papers and affirms in its billing that it was to finish this unfinished vessel. Therefore, this case has no business in admiralty as the contract does not deal directly with navigation of commerce on navigable waters. GENERAL ENGINE & MACH. WORKS, INC. v. SLAY, D.C. Ala. 1963, 222 F. Supp. 745.

An inspection of the Appellee's billings and statements confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a steaming system, and alterations to the vessel all relate to the original construction of the vessel.

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1).

In BOND V. F/V MERMAID (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction.

This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1), the

Court concluded.

III.

THE APPEALS COURT ERRED AS THEIR OPINION WOULD HAVE PRECEDENTIAL VALUE, AND AN OPINION SHOULD BE RENDERED REGARDING HOW AN UNFINISHED AND UNCOMMISSIONED VESSEL CAN SATISFY THE JURISDICTIONAL REQUIREMENT OF INVOKING ADMIRALTY LAW IN FEDERAL COURT.

The Appellant contends that the Court is unable to find any case law that would give Federal Courts jurisdiction over an unfinished or uncommissioned vessel, and that it would be in error for the Appeals Court to not dismiss this case for lack of jurisdiction.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the Trial Court, and was not advanced in a previous appeal (*Flota*

Maritima Browning de Cuba, Sociadad Anonima v. Snobl (1966, CA4 Md) 363 F 2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct. 82), AND WHEN RAISED MUST BE EXAMINED AND DECIDED (Armstrong Cork Co. v. Farrell Line Inc. (1948, DC Pa) 81 F Supp 848). (Emphasis added).

Here, the Appellant, pursuant to ARMSTRONG CORK, supra, contends that the Appeals Court should decide the jurisdictional issue and give a determination that an unfinished and uncommissioned vessel cannot have jurisdiction in Federal Court.

IV.

THE APPEALS COURT ERRED AS THEIR OPINION WOULD HAVE PRECEDENTIAL VALUE IN SHOWING HOW THE APPELLANT HAD DUE PROCESS TO DEFEND THE DEFENDANT VESSEL, EVEN THOUGH THE TRIAL COURT WOULD NEVER GRANT A HEARING EVEN THOUGH REPEATEDLY REQUESTED

TO DO SO.

The Appellant has never met the Judge, and has never had a hearing before the Court, even though requested by Motion for Hearing. This conduct seems strange, and appears violative of the 5th and 14th Amendments.

CONCLUSION

The Appellant prays that this Honorable Court will set in banc and review the jurisdictional aspects and find upon the review that the Federal Trial Court below lacked jurisdiction, and that all judgments and orders be voided by that Court for lack of jurisdiction, and for general relief.

Respectfully submitted,

• Bernard J. Dolenz

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail on this the 28th day of August, 1990 to Thomas D. Lardin c/o Steven Perry, P. O. Drawer 24, Stuart, FL 33495.

Bernard J. Dolenz

283-2834-CV-ZEE

STUART YACHT BUILDERS, INC.		NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONCEDE ARIES STARTREK	TYPE OF PROCESS CIVIL - IN REM
DEFENDANT	ARIES STARTREK, ENROLLMENT NO. 555790, TOGETHER WITH ALL TACKLE AND APPAREL		
SERVE	ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code), 450 S.W. Salerno Rd., Stuart, Florida 33494		
AT	J. FWD BADGE (P.R.) #07		

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

CRARY, BUCHANAN, BOWDISH & BOVIE, CHTD.
 ATTN: STEVEN L. PERRY
 555 Colorado Avenue, Suite One
 Stuart, Florida 33495

Number of process to be served with this Form - 283	1
Number of parties to be served in this case	1
Check for service on U.S.A.	

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (Include Business and Alternate Address, Telephone Numbers, and Estimated Times Available For Service):

The vessel is located at the above address. This is the business address of the Plaintiff and service may be arranged at any time including weekends by contacting the Plaintiff at 283-1947.

[Signature]
 Signature of Attorney or Other Originator requesting service on behalf of: PLAINTIFF DEFENDANT TELEPHONE NUMBER (305) 287-2000 DATE 6-30-86

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

I hereby certify receipt for the total number of process indicated. (Sign only first USAF 283 if more than one USAF 283 is submitted)	Total Process	District of Origin	District to Serve	Signature of Authorized USMS Deputy or Clerk	Date 7-5-86 bld
No. 04	No. 04				

I hereby certify and return that have personally served, have legal evidence of service, have received as shown in Remarks the process described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., shown in the address so served below.

I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above (See remarks below).

Name and title of individual served (if not shown above)
BURDICK

Address (complete only if different than shown above)

A person of suitable age and discretion then residing in the defendant's usual place of abode

Date 7/10/86 Time 6:00 PM
 Signature of U.S. Marshal or Deputy
Rudolf J. Fischbeck

Service Fee 6.00	Total Other Charges (including mileage)	Forwarding Fee	Total 6.00	Advance Deposit	Amount Remitted to U.S. Marshal	Amount of Return
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REMARKS: 7/10/86 ARRESTED THE ABOVE
 OCEAN GOIN G CATAMARAN C/RE
 ATTACHED INVENTORY.) VESSEL IS
 INCOMPLETE UNDER CONSTRUCTION,
 AND EMPTY OF EQUIPMENT.

(DR 7)

MARINE SPECIALIST

Ray Seese

40 SW Hideaway Place
Stuart, FL 33497

Consulting

SURVEY REPORT

SUMMARY:

...This vessel ...has never been completely finished or commissioned... Modifications to the vessel are being considered...The vessel has no standing or running rigging...The work to complete and commission this vessel is being done by Stuart Yacht Builders of Stuart, Florida. It is recommended that when the vessel is completed a survey to update these findings and a sea trial be conducted.

(Statements of Plaintiff's expert)

One of world's largest catamarans is in Stuart

* From page A1

purchased it.

The family worked on the boat for several years, doing the interior work themselves, and spent about \$100,000 in labor, materials and supplies. The boat was never completed.

The couple estimates the boat is about 70 percent completed.

But for personal reasons the couple was unable to finish the job and two weeks ago they moved out of the state, leaving the 100-foot vessel in a small cove off the St. Lucie River.

The boat, which is fitted with a double decker interior, has many construction faults and requires a great deal of work to make it seaworthy. It is located at the end of a narrow inlet off the St. Lucie River, about one-half mile from the ocean.

It is the largest boat ever built in the state of Florida.

It is the largest boat ever built in the state of Florida.

It is the largest boat ever built in the state of Florida.

It is the largest boat ever built in the state of Florida.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed October 16, 1990
No. 89-5720
89-5852

STUART YACHT BUILDERS, INC.,
Plaintiff-Appellee,
V.
ARIES STARTREK,
Defendant,
BERNARD DOLENZ,
Claimant-Owner-Appellant.

On Appeal from the United States District
Court for the Southern District
of Florida

ON PETITION(S) FOR REHEARING AND SUGGES-
TION(S) OF REHEARING EN BANC

(Opinion August 20, 1990, 11th Cir.,
198_____, F.2d_____
(October 16, 1990)

Before: FAY, KRAVITCH and COX,
Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are
DENIED and no member of this panel nor
other Judge in regular active service on
the Court having requested that the court
be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.
ENTERED FOR THE COURT:
S/S
Phyllis Kravitch
United States Circuit Judge

